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Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

SUBMISSIONS REPORT

Report on the submissions received from the Public Consultation on the Transposition of EU Directive 2019/1152 Transparent and Predictable Working Conditions

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March 2023

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Introduction

EU Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union aims at improving working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability. It repeals Directive 91/533 EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship and provides instead for more complete information on the essential aspects of the work to be received by the worker in writing at the beginning of the employment relationship. It also includes a new chapter on minimum requirements relating to working conditions providing completely new material rights for the workers in the European Union.

The Employment (Miscellaneous Provisions) Act 2018 pre-empted many aspects of the Directive, e.g., introducing an anti-penalisation provision, stronger penalties for non-compliance, restriction of zero hours contracts and more precise information on hours of work for employees. However, the Directive includes elements which go beyond the measures contained within that Act, and accordingly the Directive will require primary legislation to give it full effect.

To provide an opportunity for all interested parties to make their views on this matter known, the Tánaiste and Minister for Enterprise, Trade and Employment Leo Varadkar TD launched a Public Consultation on 17 September 2021 on the transposition by primary legislation of EU Directive 2019/1152.

The consultation process ran for five weeks until 25 October 2021. Engagement with the process was limited and a total of eleven submissions were received from a range of stakeholders including one representative trade union, two employer representative bodies, one individual employer and seven employees.

Number of submissions received:

- 7 employees in a personal capacity
- 2 Industry Representative Groups
- 1 Employer
- 1 Trade Union

This paper provides a breakdown of the responses to the questions asked in the public consultation and summarises some of the views and opinions offered by stakeholders.

The submissions informed the deliberative process when drafting legislation.

Question 1: Establishing a maximum probation period of six months

There is currently no statutory provision covering the maximum probationary period at the beginning of a job under Irish Employment Law.

If Ireland were to introduce a maximum probation period in Irish law, provision could also be made for employers to, on an exceptional basis, provide for longer probationary periods where this is justified by the nature of the employment, or in the interest of the worker. Where the worker has been absent from work during the probationary period, employers could provide that the probationary period be extended correspondingly, in relation to the duration of the absence.

Having regard to the above, what would be the benefits in establishing a maximum probation period of six months in line with the Directive?

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1. The following arguments were made <u>for</u> establishing a maximum probation period of six months in line with the Directive.

<u>Employee / Union</u>

- Provision should be made for a maximum probationary period of no longer than six months.
- Probationary periods should only be allowed in open-ended contracts and are not appropriate or justified in fixed-term contracts.

<u>Employer / Employer Body</u>

- The benefit of establishing a maximum probation period in law will be to bring consistency to practice for employers and employees across employments and reduce the risk of discriminatory practice for individuals and across employment contract types.
- A six-month period will be appropriate as the legal norm for this, reflecting much practice already in place.
- It is also important that the legislation provides for the extension of probation in certain circumstances.
- It should be permissible to extend it to cover any period of absence due to maternity, paternity, parent's parental or adoptive leave, carer's leave, illness, unauthorised absence, approved extended holiday or leave of absence.

The following arguments were made against establishing a maximum probation period of six months in line with the Directive.

Employer / Employer Body

- The legislation must allow for a longer probationary period to be set initially, in specific circumstances, on an objectively justifiable basis. This should include when a period of training must be successfully completed, a qualification received, a health and safety or legal compliance requirement met, or other fundamental requirements for the role / organisation.

- It should be permissible to extend probation to take account of any performance concerns, unsatisfactory standard of performance, supported by evidence and feedback, unsatisfactory behaviour, supported by evidence and feedback, the use of the disciplinary process, breach of health and safety, dignity at work, data protection, confidentiality, cybersecurity or other core / critical company policy, other unsatisfactory issues.

- Legislating for a reduced probationary period may not serve the interests of employees as employers may have to terminate employment earlier in the process rather than giving the employee time to improve.

- It is essential that the probationary period is no shorter than 6 months, and that this can be extended in law ensuring that an employer has the discretion to do so up to 11 months.

- Limiting probation to 6 months would negatively impact on an employer's ability to demonstrate that they have adhered to fair procedures and natural justice in the event of dismissal, especially if the issues giving rise to dismissal are not evident at the outset and time has not been afforded to due process i.e., setting goals, raising concerns, supports provided, opportunities to improve, performance being reviewed. These steps may take more than six months.

- Terminating employment within a probationary period is not without legal and reputational risk for employers with potential pitfalls and significant liabilities arising under equality, unfair dismissal, protective leave, and health and safety legislation and at common law for wrongful dismissal.

- It is crucial that the ability to extend probation periods is not the "exception" but rather the norm given the significant impact the inability to extend would have for both parties, and in particular employees. It is imperative that an employer retains the discretion to determine whether the probation should be extended considering the facts of a given case.

- The ability to extend probationary periods in some instances should be retained to ensure a fair assessment of an individual (for example relating to the duration of any period of absence during the normal probationary period).

- The legislation should allow for longer probationary periods for staff at management level where longer periods of assessment are needed.

2. The following additional arguments were made regarding establishing a maximum probation period of six months in line with the Directive.

Employee / Union

- Where an employer terminates a contract of employment before or at the end of a probationary period this must be justified, and the purpose of probation taken into account.

- An employee should be provided with a written statement confirming why the contract of employment has been terminated.

- Probation is a two-way street; the employer is also on probation with the employee. Probation duration should be such that the parties have sufficient time to build confidence and comfort that the employee can do the job. The employee knows what is expected during probation, how it will be supported, monitored, recorded, and concluded.

- The company should have a clear process and policy on probation. Periods of probation should be determined by the roles, related probation performance standards, reflecting a reasonable time for a new employee to get up to speed in meeting those standards.

- Guidance and rules on periods of probation should reflect the defined role and the skills and experience required coupled with the length and nature of a contract. Consequences of not meeting probation standards should be outlined in the job requirements/specification up front, allowing for at least one period of probation extension for improvement action if performance meets a significant level of near compliance and/or termination if not.

- Employers will benefit from more informed work and team profiling, more transparent expectations for performance in roles. A better baseline for assessment of performance and training and development needs. Nature and type of flexibility required is transparent and defined with careful use of generic wording

Employer / Employer Body

- Employees will have clarity on what they are signing up for, what they will be expected to do and when, skills and ability required and the performance standards, who will guide and support them and how issues are resolved. (No Surprises). Nature and type of flexibility required is transparent.

Question 2: Informing employees within a reasonable notice period

Where a worker's work pattern is entirely or mostly unpredictable, the worker shall not be required to work by the employer unless the work takes place within predetermined reference hours / days and the worker is informed by his or her employer of a work assignment within a reasonable notice period.

Where a worker is entitled to be informed within a reasonable notice period by his or her employer of an unpredictable work assignment, what form should this notice take?

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1. **The following arguments were made <u>for</u> employers to inform employees within a reasonable notice period of an unpredictable work assignment.**

<u>Employee / Union</u>

- The Employment (Miscellaneous Provisions) Act 2018 requires employers to giver advance notice of the number of hours an employee is expected to work in any given day or week. Employees should be free to work for another employer outside of these hours without adverse consequences.

<u>Employer / Employer Body</u>

- The notice of working hours should be consistent with the notice requirements already stipulated in legislation and the Organisation of Working Time Act. This is important to avoid confusion and to ensure consistency across different employment scenarios.

- While notice may initially be given verbally, this must be followed up with confirmation in writing. This could be email, text, company chat tool, a format that can be clearly interpreted and understood, and shown as evidence of notice.

- Even in circumstances where levels/volumes of work are unpredictable the employee should have reasonable notice of their changed requirements to ensure a sustainable work-life balance.

- A minimum of a weeks' notice is reasonable whether given verbally, in writing or through electronic means.

- Where an employer offers employees the opportunity to work additional shifts as opposed to requiring the working of shifts at shorter notice then this should be permissible.

2. The following arguments were made <u>against</u> employers having to inform employees within a reasonable notice period of an unpredictable work assignment.

Employer / Employer Body

- Employers have significant concerns regarding Article 10 of the EU Directive and EU micromanagement of the employment contract within Member States. Decisions regarding work organisation and working time arrangements should be taken at a local level.

- It is imperative that an employer's ability to manage the flow of work in their organisation and roster staff in line with business demands and the needs of customers/service users is respected.

- The work in certain sectors e.g., retail, hospitality, education, elder care, health care and social care is by its very nature unpredictable. Employers need flexible working arrangements to meet consumer demands and regulatory requirements.

- Section 17 of the Organisation of Working Time Act already provides a suitable legislative provision in terms of "reasonable" notice periods of start and finishing times to be given to employees, without unnecessarily encroaching on an employee's right to disconnect from work and work devices.

- Section 17(5) stipulates what form that notice should take. Twenty-four hours is reasonable notice like that cited in the Labour Court Decision in *Lucey Transport Ltd v Serenas DWT 141/2013*.

- Section 28 of the Workplace Relations Act 2015 empowers WRC Inspectors to serve compliance notices, where required.

Question 3: Favourable presumptions where a worker has not received documents in due time

Where a worker has not received in due time all or part of the documents required under the Directive, one or both of the following shall apply: the worker shall benefit from favourable presumptions which employers shall have the possibility to rebut and the worker shall have the possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.

The WRC is a competent authority within the meaning of the Directive which provides adequate redress in a timely and effective manner. To provide the best protection to workers, should Ireland also introduce provisions that a worker shall benefit from favourable presumptions where a worker has not received in due time all or part of the documents required under the Directive?

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1. **The following arguments were made <u>for</u> Ireland to introduce provisions that a worker shall benefit from favourable presumptions where a worker has not received in due time all or part of the documents required under the Directive.**

<u>Employee / Union</u>

- It is entirely appropriate that employees benefit from favourable presumptions where that worker has not received in due time all or part of the documents required under the Directive.

<u>Employer / Employer Body</u>

- A worker should be entitled to request any information that has not been provided in their Terms and Conditions of Employment, and to formally request any clarity that is needed.

- Where no contract of employment has been provided, working, and being paid under a specific set of arrangements and working pattern should be taken as custom and practice and the essence of the employment relationship.

- The presumptive conditions should reflect the actual working hour bands which the employee has been working, unless the employee is willing to accept alternative conditions without duress.

2. **The following arguments were made <u>against</u> Ireland introducing provisions that a worker shall benefit from favourable presumptions where a worker has not received in due time all or part of the documents required under the Directive.**

<u>Employer / Employer Body</u>

- Ireland should not introduce any legislative measures that would result in employees benefitting from favourable presumptions, which employers would then have to rebut.

- Employers submit that any presumptions that result in a shift of burden of proof in the context of an employee not receiving a statement as to their terms and conditions would be entirely disproportionate to the breach and consequent detriment to the employee.

- Employees already have the possibility to submit a complaint to a competent authority under section 3 of the Terms of Employment (Information) Terms of Employment (Information) Act 1994 as amended by section 7 of the Employment (Miscellaneous Provisions) Act 2018. Section 10 of the Employment (Miscellaneous Provisions) Act 2018 contains offence provisions.

- It is imperative that employers can avail of a "reasonable cause" defence for failing to provide the documentation required, as provided for in section 10 of the Employment (Miscellaneous Provisions) Act 2018.

- We believe drawing favourable presumptions from what may in many instances be an oversight or administrative error would be a disproportionate response.

- With notice to the employer an ability for a competent authority to order a correction of the matter would be a better approach

3. **The following additional arguments were made regarding Ireland introducing provisions that a worker shall benefit from favourable presumptions where a worker has not received in due time all or part of the documents required under the Directive.**

<u>Employee / Union</u>

- Contracts, Policies and Procedures should reflect stability with standard allowances for unplanned demand covered by Overtime policy and Call-in policy.

- Where specific on-call capacity is required and justified then specific role contracts should be in-place that reflect with compensation in the form of on-call payment and/or guaranteed minimum hours over a period.

Question 4: Does the existing legislation provide sufficient protection against penalisation?

Workers, including those who are workers' representatives, will be protected from any adverse treatment by the employer and from any adverse consequences, including dismissal, resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance with the rights provided for in this Directive.

There are existing anti penalisation provisions in section 6 C of the Terms of Employment (Information) Act 1994.

In your view does the existing legislation provide sufficient protection against penalisation or threat of penalisation from an employer i.e. where an employee invokes any rights under that Act which cover the written statement and other key employment information for employees?

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1. **The following arguments were made that existing legislation <u>does</u> provide sufficient protection against penalisation or threat of penalisation from an employer i.e. where an employee invokes any rights under that Act which cover the written statement and other key employment information for employees.**

<u>Employer / Employer Body</u>

- The penalisation clauses of Section 6C of the Act are robust and have stood the test of time. The definition of penalisation could be extended to cover additional scenarios related to the predictability or working hours. For example, penalisation should include a reduction in the average working hours being offered, even where they fall within the band of working hours stated in the contract.

- Section 6C of the Terms of Employment (Information) Act 1994 as amended by s.11 of the Employment (Miscellaneous Provisions) Act 2018 provides sufficient and significant protection to employees against penalisation or the threat of penalisation.

- The definition of penalisation as defined in s.11(5) is extensively broad and together with s.26 of the 1997 Act as amended by s.17 of the Employment (Miscellaneous Provisions) Act 2018 are sufficient to meet the required measures.

- We believe that employees or their representatives should not be penalised for taking proceedings in good faith and there appears to be adequate protection in the existing legislation for employees in that regard.

2. **The following arguments were made that existing legislation <u>does not</u> provide sufficient protection against penalisation or threat of penalisation from an employer i.e. where an employee invokes any rights under that Act which cover the written statement and other key employment information for employees.**

<u>Employee / Union</u>

- Section 6 of the Act of 1994 should be amended to include a reference to employee representatives.

- Section 6C (1) should be amended as follows: "An employee shall not penalise or threaten penalisation of an employee or their representative."

Other general comments from respondents

Article 1 – Purpose, subject matter, and scope.

Employer / Employer Body

- The question of what constitutes a "worker" should remain within the competence of Member States to reflect the workplace cultural differences across Member States, and protections must only be afforded to those who have a contract of employment.

- The Directive will result in significant changes in what is already an over-regulated environment with legislative proposals on sick pay and the right to request remote working. Much of the measures have been pre-empted by the Employment (Miscellaneous Provisions) Act 2018 and new laws should only transpose the minimum requirements to give effect to the Directive.

- It is imperative that the Directive does not give rise to any further unnecessary costs and administrative burden on employers and must be cognisant of the need for employers to sustain employment and remain competitive.

- Genuinely self-employed persons should not come within the scope of the Directive and protection should only be afforded to employees as defined in law.

Employee / Union

- For an economy and companies/organisations maintaining competitive labour costs is important but not at the expense of exploitation. Employment law and its practice should strike a balance with minimum wage legislation, contract alignment, etc.

Article 3 – Provision of Information.

Employee / Union

- When an employee is presented with employment clauses, they should reflect the specific role and not just be boiler plate in every contract. If they are important to the employer, it will be clear to the employee in advance why they are important and reflected in the terms and conditions of employment.

- The employee should also be clear and transparent about any related activities or future plans they might have in the context of starting employment and changing circumstances during employment.

- Depending on the role, seniority, access, or source of company confidential information or IPR certain clauses need to be included in employment contracts and reviewed and updated when there are internal job changes and promotions. The guidelines should be documented and available in a company Policy or Procedure manual.

    - Probationary period clause. ...
    - Non-compete clause. ... Non-solicitation clause. ...
    - Outside activities clause. ...
    - Changes clause. ...
    - Incorporation clause. ...
    - Confidentiality clause. ...
    - Penalty clause.

- Contract of employment clauses are to protect both the Company and employee and should be balanced and considered reasonable by a normal person. They should protect the company's investment in an employee without damaging normal rights, fairness, and freedoms

Article 9 – Parallel employment

Employer / Employer Body

- Any changes must respect common law principles that imply fidelity and loyalty to contracts of employment, the protection of confidential information and trade secrets, and the obligation not to compete while in an employer's employment. Post termination restrictions must be reasonable and protect confidential and commercial information.

- Employers must be able to restrict an employee from being engaged directly or indirectly during their period of employment in any business which is similar to or in competition with that employer business or company, or which in the employer's opinion would prejudice the employee's ability to act at all times in the best interests of their employer's business.

- Any proposed legislation should allow employers to prohibit employees working for competitor organisations in parallel with their employer where such working may affect the integrity of the business or its brand.

Article 10 – Minimum predictability of work.

Employee / Union

- Unpredictable on-demand work should be the exception rather than the norm in any labour market. Specific work and roles will of course be required and should be available and transparent to employees as to the nature and requirements.

- There should be an onus on all employers to continually analyse and review demand for workers and specific roles (Capacity Planning). Where sustainable predictable demand under normal environmental circumstances exists then contracts of employment should have definitive place(s) and times for workers as appropriate to each role type.

Employer / Employer Body

- The transposition of the directive must recognise the needs of forms of employment and businesses which have variable demands and which demands are not entirely predictable or predictable with reasonable notice.

Article 12 – Transition to another form of employment

Employer / Employer Body

- Employees who have completed their probationary period and meet eligibility criteria can apply for posts in the normal manner. However, there should be no legal requirement upon employers to provide a written 'reasoned' refusal when an employee requests same.

- S.10 of the Fixed Term Act 2003 already ensures that fixed-term employees are informed of available vacancies and provides for the form by which such notice is brought to employee's attention.

- Employees would be required to have the skills and knowledge necessary to perform a role with more predictable hours and would be subject to a further probationary period in that new role.

- An employer should only be obliged to notify an employee that they have been shortlisted, successful or unsuccessful in the recruitment process and there should be no legal requirement to set out any reasons therein.

- The Employment (Miscellaneous Provisions) Act 2018 already provides a provision for applying for banded hours on a reference period of 12 months for employees on variable hour contracts. A reference period of 6 months would be wholly inadequate.

Article 13 – Mandatory Training

Employer / Employer Body

- The transposition of this Article must not give rise to additional costs and administrative burdens on employers.

- Employers should only in law be required to pay for training where it is a legal requirement or essential to the performance of an employee's role. The timing and duration of training must be reasonable.

- Training costs must be reasonable and proportionate to the administrative burdens placed on employers.

- Training cannot always take place during working time, given the difficulty in replacing key staff at short notice where there may be no available staff to whom duties can be reallocated.

Employee / Union

- All new, transferred or promoted employees should receive induction & training cost free as it directly relates to carrying out the tasks and activities of their roles. This excludes educational qualifications and training required / outlined in job requirements.

- Employers need transparency in hiring requirements when it comes to Education, Experience & Skills for each role.

- Skills analysis should be required indicating any gap in hiring and appointment requirements and role skills required which should inform individual and role training programs that the organisation will provide.

- Promotion, Progression and Transfer should be available to all qualified employees.

Article 19 – Penalties

Employer / Employer Body

- The proposal to include financial compensation as well as fines for breaches of the transposed provisions is grossly disproportionate in legislation which is essentially an information / administrative exercise.

- Sanctions, where justified, must be proportionate to the detriment suffered by an employee e.g., as contained in the Terms of Employment (Information) Act 1994 and must avoid frivolous or vexatious claims. The Employment (Miscellaneous Provisions) Act 2018 has already introduced grossly disproportionate remedies.

- Employers must be entitled to a “reasonable cause” defence for failing to provide information e.g., done in error or omission or accidentally or in good faith.

- No further legislation is required in respect of penalisation or threat of penalisation of employees.

- There is no requirement to legislate for an employee to bring a claim to a “competent” authority as such a right already exists in respect of claims to the WRC.

- Shifting the burden of proof / financial compensation / fines for beaches on employers where an employee alleges that they were dismissed due to exercising their rights to a statement of their terms and conditions is wholly disproportionate and unnecessary. Effective and significant redress already exists in law.

- Legislation must provide for a “reasonable cause” defence for employers for failure to provide a written statement, including where an error or omission made accidentally and in good faith occurs.

Article 20 – Non-regression and more favourable provisions.

Employer / Employer Body

- An employee must not be afforded “favourable presumptions” where they claim not to have received information as to the essential aspects of their role, as any such presumptions are unnecessary and disproportionate.